Filed 10/3/03 P. v. Polanco CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>IRVIZ POLANCO,<br><br>Defendant and Appellant. | B160122<br><br>(Super. Ct. No. BA225290-01) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronni B. MacLaren, Judge. Affirmed.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, and Deborah J. Chuang, and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Appellant Irviz Polanco challenges robbery and attempted robbery convictions on grounds the trial court erred at the hearing on pre-trial motion, by admitting evidence of an eyewitness's identification of him and barring defense counsel from reading from an article about eyewitness misidentification. Appellant also contends the prosecutor committed misconduct during argument by impugning defense counsel's integrity and referring to appellant's failure to testify. We conclude the trial court properly admitted evidence that one victim tentatively identified appellant at a pre-trial hearing. Although the court erred by refusing to review book excerpts defense counsel proposed to read during argument, the error was harmless. Finally, the prosecutor did not commit misconduct.

## BACKGROUND AND PROCEDURAL HISTORY

Appellant entered a small perfume store, pointed a gun at store owner Bernadino Lopez, and demanded all of the money. Lopez handed appellant two $10 bills, which was all the money contained in the cash register. Appellant demanded Lopez's wallet, which co-owner Cristina Naranjo gave to him. Appellant examined the wallet and finding it empty, left it. Appellant fled after Lopez refused his demand for perfumes.

A jury convicted appellant of second-degree robbery and attempted second-degree robbery and found appellant personally used a gun in the commission of each crime. The court sentenced appellant to prison for 13 years.

## DISCUSSION

### 1. The trial court did not err by admitting evidence that Naranjo tentatively identified appellant at a pre-trial hearing.

On the eve of trial, appellant moved to exclude evidence that Naranjo identified him as the robber at a single-suspect show-up conducted in a police station parking lot shortly after the crime. The trial court conducted an evidentiary hearing on the motion at which Naranjo, Lopez and the police officer who responded to their 911 call testified.

When Naranjo entered the courtroom at the start of the hearing, appellant was already in the courtroom. The court asked Naranjo to step outside, and appellant returned to

the holding cell adjacent to the courtroom. Naranjo was then called to testify outside appellant's presence. Although she admitted she was purposely looking at appellant as she sat in the back of the courtroom, she stated she could see only his back. Naranjo described the robber in terms of height, weight, skin color, facial shape, facial hair and hairstyle. The court later noted her description matched appellant, at least in terms of "the two most prominent descriptors." Appellant returned to the courtroom. Naranjo testified he looked like the robber and had the same skin color, but she was not certain he was the robber.

Naranjo testified she was about thirteen feet from the robber when he pulled a gun and demanded money. The robber stood right in front of Lopez, who was at the cash register. Naranjo was in the "back part" of the store, separated from Lopez by a three and one-half feet tall display. From that position, she could not see the robber clearly. However, when he demanded Lopez's wallet, she moved next to Lopez and removed the wallet from the cash register. From that position, she got a good look at the robber's face. She was frightened, but she focused on his face, paid close attention, and looked at him for one or two minutes.

Lopez testified that when the robber ran from the store, he followed him and saw the direction in which the robber ran. He called the police. When the police arrived, they drove him around in their squad car to look for the robber. After he identified a suspect, the police took him back to his perfume store. Lopez initially testified he was alone with Naranjo for about 15 to 20 minutes between the time the police returned him to the store and the time they took him to identify the suspect. During that time, the police told him the robber had been arrested. Lopez later contradicted himself and said the police took him to identify the suspect as soon as they returned him, and he did not talk to her before she left.

Naranjo testified that after the police returned Lopez to the store, Lopez told her the police had detained the robber. The police then drove her to a police station parking lot. Naranjo remained in the back of the police car while appellant stood about 39 feet away. He appeared to be handcuffed. Naranjo identified appellant and was certain of her identification. She attributed her certainty to her own memory, based upon her

observations, as well as Lopez's statement that he had identified someone.

Naranjo testified at trial that Lopez had told her the robber was present when he testified at the preliminary hearing. Lopez, however, said nothing to her before her testimony at the hearing on appellant's motion.[1]

Officer Roger Perez testified that Lopez and Naranjo did not converse between the time he returned Lopez to the store and took Naranjo to identify appellant. He was certain of this, because he did not leave the two alone out of his presence. Perez explained to Naranjo enroute to the police station that the police had detained someone, but he was not necessarily a suspect, even though he was detained and might be in handcuffs or in a police car. He explained that Naranjo's job was to either identify or eliminate the person as a suspect. The single-suspect show-up was held in the police station parking lot because it was safe and well-lit. Officers had already transported appellant from the location where arrested because appellant's wife or girlfriend was present and creating a hostile scene. During the show-up, appellant stood near several police officers with his hands cuffed behind his back. Naranjo did not leave the police car, which was located about 30 feet from appellant. Naranjo identified appellant immediately. The police did not tell her that Lopez identified the same person.

The trial court found that Lopez did not talk to Naranjo between the time the police returned Lopez to the perfume store and the time they took Naranjo to the police station. The court nonetheless ruled the field identification (December 6 identification) was inadmissible, finding that conducting it in a police station parking lot was inherently suggestive. Accordingly, the court granted appellant's motion to exclude evidence of that identification. The court found, however, that Naranjo's in-court identification was reliable and she would be permitted to identify appellant at trial. Appellant asked the court to exclude evidence of Naranjo's identification at the motion hearing (May 1 identification) on

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[1] Appellant mistakenly cites as evidence that Lopez told Naranjo the robber was in the courtroom at the hearing on the motion, Naranjo's testimony regarding the preliminary hearing.

the grounds it was hearsay and tainted by the December 6 identification. The court denied the request, finding a hearsay exception (Evid. Code, § 1238) applicable and finding the May 1 identification untainted by the December 6 identification. Appellant withdrew his objection to the December 6 identification and asked that it be admitted at trial. The court permitted appellant to do so and to argue at trial that Naranjo's in-court identification was tainted by the December 6 identification.

At trial, the prosecutor introduced evidence of Naranjo's physical description of the robber that she had given in court on May 1; appellant proceeded to introduce evidence of her in-court identification of appellant.

Appellant contends Naranjo's May 1 identification was tainted by the December 6 identification, and that the trial court therefore erred in admitting evidence of the May 1 identification.

A pre-trial identification procedure violates a defendant's due process rights if it is so impermissibly suggestive that it creates a very substantial likelihood of irreparable misidentification, i.e., it "suggests in advance of identification by the witness the identity of the person suspected by the police." (*People v. Hunt* (1977) 19 Cal.3d 888, 894; *People v. Sanders* (1990) 51 Cal.3d 471, 508.) A single person show-up is not inherently unfair. (*People v. Hunt*, *supra*, at p. 893.) The defendant bears the burden of proving unfairness as a demonstrable reality. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

Even where the defendant proves that the identification procedure was impermissibly suggestive, evidence of the identification or subsequent identifications is not excluded if the People can prove that the identification was nonetheless reliable. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242 overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787.) In determining the reliability of an identification following an impermissibly suggestive identification procedure, the court should consider factors such as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated

by the witness at the confrontation, and the time between the crime and the confrontation. (*People v. Desantis*, *supra*, 2 Cal.4th at p. 1222.)

In determining the issue, we review the totality of the circumstances, resolve all evidentiary conflicts in favor of the trial court's finding, and uphold that finding if substantial evidence supports it. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 788.)

Appellant, not the prosecutor, introduced evidence of Naranjo's May 1 identification. As a result, he is in no position to complain that the trial court erred in admitting the testimony. Moreover, although appellant initially challenged the December 6 identification as impermissibly suggestive and persuaded the trial court to adopt his position, he expressly abandoned that contention by withdrawing his objection to the field show-up. Accordingly, his contention on appeal is essentially that the in-court May 1 identification was inadmissible because it was tainted by the unobjectionable December 6 identification. Clearly, such a claim can have no merit.

Moreover, even assuming appellant did not forfeit his claim by withdrawing his objection to the December 6 identification and introducing the May 1 identification evidence, the totality of the circumstances establish that the December 6 identification was nonetheless reliable. The May 1 identification was therefore also reliable. Naranjo had a good opportunity to view appellant during the robbery. Although her view of him when he first pulled a gun and demanded money was apparently inadequate, she acquired a good, frontal view when she moved to the cash register. She testified that, from that position, she looked at the robber for one or two minutes. Based upon Lopez's trial testimony that he was standing behind the cash register and was just two feet from the robber, who stood right in front of the cash register, Naranjo would have been standing within a few feet of the robber once she moved to the register. Lopez and Naranjo testified that the lighting in the store was good. Naranjo's degree of attention was high. According to her testimony, she paid attention, concentrated and focused on appellant's face. Although it was unclear whether Naranjo described the robber for the police, the description she gave in court on May 1, outside appellant's presence, matched appellant well, according to the trial court. During the

December 6 identification, which occurred no more than one hour after the robbery, Naranjo was certain and unhesitant. She was a little less certain about five months later at the May 1 hearing. However, her uncertainty properly reflected upon the weight, not the admissibility, of the identification. Moreover, Naranjo's uncertainty benefited appellant, who questioned her about the tentative nature of her May 1 identification. Although there was conflicting evidence regarding whether Lopez told Naranjo, before she made her field identification, that the police had arrested the robber, the trial court believed Lopez's testimony that he had not done so, which was consistent with Officer Perez's testimony. In any event, the jury heard the same conflicting testimony at trial, and could consider the possibility that Lopez tainted Naranjo's identification in its evaluation of the credibility and the weight to be given Naranjo's identification testimony.

Furthermore, any error in admitting the May 1 identification was harmless beyond a reasonable doubt. Lopez, who had an excellent opportunity to observe the robber, identified appellant at trial. Naranjo also identified appellant at trial, and appellant does not challenge her trial identification. Appellant was arrested in the vicinity of the robbery within a short time after the crime. He had one $10 bill in his possession and had immediately prior to his arrest purchased a pack of cigarettes with a $10 bill. He therefore had property consistent with that taken in the perfume store robbery. Thus, there is no reasonable possibility the jury would have failed to convict appellant had it not heard of Naranjo's May 1 identification.

**2. The trial court's error in refusing to review book excerpts defense counsel proposed to read during argument was harmless.**

Appellant's theory of the defense was misidentification. Prior to argument, the prosecutor objected to defense counsel's intent to read from a book during argument. The prosecutor described the portion of the book in question as stating that DNA evidence had established that eyewitness identifications were fallible. Defense counsel did not dispute the characterization, and described it as "generalized statements." The prosecutor explained that he had no objection to counsel arguing that DNA evidence has established that

"eyewitness testimony is not infallible," but argued that reading from a book meant someone was "vouching for it." The trial court agreed with the prosecution, observing that the case did not involve DNA evidence, and reading from a book "comes close to your testifying and introducing evidence of [sic] a nature of expert testimony." Defense counsel contended he should still be permitted to argue that in other cases, DNA evidence had established that eyewitness identifications were inaccurate. He repeatedly asked to read excerpts from the book into the record as an offer of proof, but the court consistently refused. The court told counsel he could argue the fallibility of eyewitness identifications, but could not read from the book.

Appellant contends the trial court erred by failing to read the book excerpts in question or to permit defense counsel to read them into the record.

Counsel's argument may be based on matters in evidence or subject to judicial notice. (*People v. Farmer* (1989) 47 Cal.3d 888, 922, overruled on another ground in *People v. Waidla* (2000) 22 Cal.4th 690.) It may also refer to matters of common knowledge or illustrations drawn from common experience, history, or literature. (*Farmer, supra,* at p. 922.) Where counsel proposes to read an article to the jury, the trial court may not refuse the request simply because the article is not in evidence. (*Id.* at p. 922, fn. 7.) Instead, the court must review the article to determine whether its contents are within the scope of proper summation. (*Ibid.*) Counsel may not confuse the jury with hearsay by reading or relating the facts of unrelated crimes, but may, in the discretion of the court, be permitted to refer to or read from newspaper or magazine articles reflecting matters of common knowledge, such as incidents of misidentification. (*People v. London* (1988) 206 Cal.App.3d 896, 909; *People v. Guzman* (1975) 47 Cal.App.3d 380, 392 disapproved on another point in *People v. McDonald* (1984) 37 Cal.3d 351; *People v. Woodson* (1964) 231 Cal.App.2d 10, 15-16.) Whether a particular article should be read to the jury is a matter left to the sound discretion of the trial court. (*People v. London*, *supra*, 206 Cal.App.3d at p. 909.)

The trial court's discussion with counsel indicates the court misunderstood either the

aforementioned standards or the purpose of defense counsel's proposed reading. The absence of DNA in this case was completely irrelevant to the point counsel sought to make and to the analysis the court should have performed in deciding whether to permit counsel to read from or refer to news articles regarding misidentification. The existence of DNA evidence in other cases presumably referenced by counsel's book no doubt was simply the means by which it was established that a misidentification occurred. Accordingly, the absence of DNA evidence in appellant's case had no bearing on whether counsel should have been permitted to read from the book.

As appellant implicitly recognizes, the record on appeal is insufficient to permit this court to determine whether it would have been proper for defense counsel to read from the book in question. The responsibility for this gap in the record rests solely with the trial court. Defense counsel repeatedly endeavored to make his record on this point, but was rebuffed each time.

The trial court clearly erred by failing or refusing to either, review the book excerpts or permit defense counsel to read the excerpts to the court for its consideration. Nonetheless, we believe the court's failure to familiarize itself with the contents of the book excerpts was harmless, under the circumstances. The prosecutor and defense counsel described the nature of the excerpts in similar fashion. Given the obviously strong nature of the court's views regarding counsel reading from the book, it is extremely improbable the court would have permitted the proposed reading if it had reviewed the material or heard its exact content. The decision was entirely discretionary, and appellant would have an extremely difficult task in establishing an abuse of discretion, had the court reviewed the material.

Moreover, the court did not preclude defense counsel from arguing, either in general or specific terms, that there have been cases where a victim or witness positively identified a particular defendant who was later conclusively exonerated by DNA or other evidence. To the extent counsel's book included descriptions of particular cases that illustrated this point, counsel could have briefly told the jury about those instances of misidentification and

exoneration without reading directly from the book. Counsel addressed this point, albeit briefly and without specific examples, in his argument. Counsel also argued the unreliability of the identifications in this case, based upon some of the factors set forth in CALJIC No. 2.92. Under the circumstances, there is no reasonable possibility the trial court's error in failing to review the materials contributed to appellant's conviction.

**3. The prosecutor did not engage in misconduct.**

Appellant contends the prosecutor committed prejudicial misconduct in his closing argument by disparaging defense counsel's character and referring to appellant's failure to testify.

Conduct by a prosecutor that does not violate a ruling by the trial court is misconduct only if it amounts to the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury or is so egregious that it infects the trial with a degree of unfairness that makes the conviction a denial of due process. (*People v. Silva* (2001) 25 Cal.4th 345, 373.)

If a prosecutorial misconduct claim is based on arguments made to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522; *People v. Benson* (1990) 52 Cal.3d 754, 793.) No misconduct exists if a juror would have taken the statement to state or imply nothing harmful. (*People v. Benson*, *supra*, 52 Cal.3d at p. 793.) A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.)

It is improper for a prosecutor to resort to personal attacks on the integrity of opposing counsel. (*People v. Bell* (1989) 49 Cal.3d 502, 538.) It also is improper for the prosecutor to imply that defense counsel fabricated evidence or to otherwise portray defense counsel as the villain in the case. (*People v. Thompson* (1988) 45 Cal.3d 86, 112.) It is not improper, however, for a prosecutor to comment on apparent inconsistencies in defense arguments. (*People v. Bell*, *supra*, 49 Cal.3d at p. 537.)

Appellant contends portions of the following segments of the prosecutor's closing argument disparaged defense counsel's character. Because the challenged arguments must be considered in context, we quote or describe each entire segment. For ease of future reference, we assign a number to each segment. Unless otherwise noted, the quoted speaker was the prosecutor.

Segment 1: "Yesterday, when I was listening to defense counsel argue, he tried to make this case about the police, and this case is not about the police."

Segment 2: "And [defense counsel] Mr. Moore got up here, and he talked to you for about 50 minutes, and he told you his take on the witnesses. But Mr. Moore does not have an obligation to fairly evaluate the testimony of witnesses. Mr. Moore has an obligation to present the facts in the manner that is most favorable to his client." Defense counsel objected that he had such an obligation, but the court overruled the objection, stating, "This is argument. He is not indicating that the defense has misrepresented anything. This is argument."

Segment 3: The prosecutor argued defense counsel was labeling Officer Perez a liar and said, "I think that is ridiculous." Defense counsel objected that the prosecutor's opinion was irrelevant. The trial court overruled the objection and noted, "This is argument. [¶] But you should not give your personal opinions, Mr. Schneider."

Segment 4: "All Mr. Moore had to do, if he didn't like that answer 'at that time,' simply how about this: 'What do you mean at that time?' [¶] Defense counsel didn't ask that question and now he comes into court and tells you, on that basis that the officer said 'at that time,' at the time he met Mr. Lopez, calls him a liar."

Segment 5: "Mr. Moore spent an awful lot of time with the officer—'Did you tell the witness that the individual was in temporary custody?'" He kept going over and over it. And the officer's response was, 'I didn't use those words. I told the witness he was being detained.' [¶] Mr. Moore is suggesting to you that there is some difference, but it is a distinction without a difference. He is simply trying to make you focus on the facts that are not relevant in this case." Defense counsel objected, "Those are personal disparagements."

The trial court called counsel to sidebar and said, "Okay. Sometimes argument gets personal in the sense that Mr. Schneider is challenging your arguments, but it not personal in the sense that he is attacking you for lack of integrity. It is that he is attacking your arguments, and he is entitled to do that." Defense counsel disagreed and said he wanted the "objection to stand." The court said, "The objection clearly is on the record and will stand. But I don't want to reprimand defense counsel in front of the jury, but if you continue to interrupt Mr. Schneider's closing arguments with these kinds of objections, I will. [¶] You need to make whatever record you believe is appropriate, but I think to continuously interrupt this argument because you don't like what Mr. Schneider is saying about your arguments is inappropriate."

Segment 6: "Mr. Moore, in an interesting selection of words, chose to say that there was a scuffle."

Segment 7: "Most importantly, what didn't we hear from the defense in this case? What is this case about? What didn't we hear? This case is not about the police. This case is about is [sic] the I.D. by the victims reliable? [¶] He didn't take you through those factors. He said, oh, it is under stress, so you can't believe it. And it is suggestive, so you can't believe it. And he made boldface assertions without support. [¶] It is your job to decide. This is really what I want you to decide. Because I don't want you to convict because of his personality or minor arguments, I want you to convict based on your determination that the I.D. was, under the circumstances, reliable. [¶] Because defense counsel asked you to look at this through a lens. Whose lens are we really looking at this crime through? It is the victims who saw the defendant. Because how else can we know whether their I.D. is reliable, but to look through their eyes. [¶] Just because Mr. Moore doesn't like the way the investigation was conducted doesn't mean that the victims are not reliable." The trial court interrupted to say the prosecutor was personalizing his comments, and "He is an advocate for the defendant, it is not a personal matter." The prosecutor expressed agreement: "Absolutely, it is not a personal situation."

Absent a showing that the harm could not have been cured, an appellant may not

complain of prosecutorial misconduct unless he objected to the alleged misconduct in a timely fashion at trial and requested that the jury be admonished to disregard the impropriety. (*People v. Benson*, *supra*, 52 Cal.3d at p. 794.) Appellant essentially argues that further objection was futile, as shown by the trial court's "direct language and general tenor" in rejecting his objection, as quoted in segment 5 above. However, appellant did not object to the arguments in segments 1 and 4, which preceded the court's purportedly intimidating warning. Therefore, at a minimum, appellant forfeited his objection to those two argument segments, as there is no basis for concluding that a timely objection and admonition would not have cured whatever trivial harm is inherent in the prosecutor's argument that defense counsel tried to make the case about the police and could have asked additional questions if he did not like the officer's answer. Appellant also failed to object to segment 3 on the ground raised herein, i.e., that the prosecutor was denigrating his integrity. His relevance objection was insufficient to alert the court that appellant felt the statement was a personal attack on defense counsel.

Assuming that appellant adequately preserved his claims regarding the remaining argument segments, we nonetheless find them to have no merit. Considered in context, reasonable jurors would not have taken the statements to state or imply anything harmful. In segment 2, the prosecutor told the jury that defense counsel did "not have an obligation to fairly evaluate the testimony of witnesses," but instead had "an obligation to present the facts in the manner that is most favorable to his client." In context, the statements would reasonably be understood to caution jurors that defense counsel's argument was necessarily based upon the interpretation of the witnesses' testimony most favorable to appellant, whereas the jurors must base their decision on their own evaluation of the evidence. To the extent the statements could be interpreted as a comment on defense counsel's integrity or performance, they were significantly less disparaging than statements found not to constitute misconduct in *People v. Breaux* (1991) 1 Cal.4th 281, 305 [in closing argument prosecutor stated that attorneys learned in law school that if neither the facts nor the law favored their position, they should try to create confusion to benefit the defense] or *People*

*v. Williams* (1996) 46 Cal.App.4th 1767, 1781 [in closing argument prosecutor stated that, because the facts were against the defendant, defense counsel had to "obscure the truth" and distract the jury in order "to manufacture doubt" where none existed].

Similarly, the prosecutor's argument in segment 5 that defense counsel was inaccurately suggesting there was a difference between detention and temporary custody and trying to make the jury focus on irrelevant facts was fair comment on the evidence and defense argument. It would be understood by reasonable jurors to be an argument that detention and temporary custody was the same thing and the defense was belaboring a non-existent distinction that was irrelevant to the case. Segment 5 is not susceptible of an interpretation constituting an attack on defense counsel, as opposed to his questioning or argument.

The prosecutor's statement in segment 6 that "scuffle" was an "interesting" choice of words by defense counsel to describe the confrontation between appellant's fiancée and the police at the scene of appellant's arrest was innocuous. No reasonable juror would understand it as impugning defense counsel's integrity.

In segment 7, appellant specifically complains of the following: "He didn't take you through those factors;" "And he made boldface assertions without support;" "Because defense counsel asked you to look at this through a lens"; and "Just because Mr. Moore doesn't like the way the investigation was conducted …." In context, however, reasonable jurors would only understand the statements to refer to defense counsel's failure to address in his argument all of the factors properly considered in evaluating eyewitness identification testimony. The statements in no way impugn counsel's integrity.

Appellant further contends that portions of the following segments of the prosecution's argument constituted references to his failure to testify, and therefore violated *Griffin v. California* (1965) 380 U.S. 609, which prohibits the prosecutor and court from directly or indirectly commenting on the defendant's failure to testify. However, comments on the state of the evidence or on the defense's failure to call logical witnesses, introduce material evidence, or rebut the People's case are permissible. (*People v. Medina* (1995) 11

Cal.4th 694, 755.) Such comments violate *Griffin* only if the defendant alone could have given such evidence. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.)

To resolve this issue, we again describe or quote the challenged portion in context and assign a letter to each segment for ease of further reference. Unless otherwise noted, the quoted speaker was the prosecutor.

Segment A: "Let's talk about what we did not hear from the defense in argument." The prosecutor then addressed "the conditions facing the officers on that night," i.e., an argument and hostile confrontation between appellant's fiancée in which bystanders soon joined. The prosecutor argued that, in light of those conditions, it was appropriate for the police to transport appellant to the police station parking lot for the field show-up with Naranjo. He then moved on to Segment B.

Segment B: "What else didn't we hear from the defense? We didn't hear virtually anything about the defense witnesses, the alibi witnesses. Why not? Why not? Because obviously, the sister-in-law—I'm using that for lack of a better term—was obviously not credible." He then argued what he believed were flaws and gaps in the alibi testimony.[2] The prosecutor then moved on to Segment C.

Segment C: This was set forth as segment 7 above.

Read in context, no portion of segments A, B, and C would be understood to refer to appellant's failure to testify. The prosecutor was clearly—even expressly—referring to argument by defense counsel, pointing out the matters counsel did not address. Moreover, the trial court instructed the jury not to draw any adverse inference from the fact that appellant did not testify. There is simply no possibility the jury would view any of the

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[2] Appellant's fiancée, Vanessa Rojas, testified she arrived home between 5:00 and 6:00 p.m. on the day of the robbery. Appellant, accompanied by Rojas's sister, was about to take their 21-month-old child to the park. Rojas stayed home, but asked appellant to buy her cigarettes while he was out. Rojas's sister, Marlene, testified she and appellant played with the baby at the park for 10 to 30 minutes before appellant went to a nearby market to buy cigarettes. When appellant did not return, Marlene went to the market, where she saw appellant on his knees being arrested by the police. She ran home to tell her sister, who then went to the market and began arguing with the police.

challenged argument as a comment on appellant's exercise of his right to silence.

Accordingly, none of appellant's prosecutorial misconduct claims have merit.

**DISPOSITION**

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.